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Supreme Court, U.S.
FILED
JAN 26 2001
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

(4)

Case No. 00-6567

LARRY DEAN DUSENBERY,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY

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JAN 30 2001

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Questions Presented

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

List Of Parties

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 5 in opening brief) is reported at 223 F.3d 422. The order of the district court (Pet. App. 4 in opening brief) is reported at 34 F.Supp.2d 602. A prior opinion of the Court of Appeals (Pet. App. 1 in opening brief) is not reported, but the judgment is noted at 97 F.3d 1451 (Table).

Jurisdiction

The judgment of the Court of Appeals was entered on July 10, 2000. (Pet. App. 5 in opening brief). A petition for rehearing or rehearing en banc was denied on August 25, 2000. (Pet. App. 6 in opening brief). The petition for a writ of certiorari was filed on October 16, 2000. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

FIFTH AMENTMENT:

No person...shall be deprived of life, liberty, or property, without due process of law....

REPLY

Reason For Granting The Writ

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

The issue in this petition involves a split among the circuits as to whether an incarcerated prisoner must receive "actual notice" regarding a forfeiture notification. The Sixth, Ninth, and Tenth Circuits find that the government complies with due process requirements by sending a forfeiture notification to the inmate's place of incarceration, even if the prisoner may not actually have received the notice. See United States v. Dusenbery, 223 F.3d 422 (6th Cir. 2000)(this Court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process); United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996)(concluding that government complied with due process requirements when it sent notice by certified mail to prison where claimant was incarcerated, even if claimant may not actually have received notice); United States v. Real Property, 135 F.3d 1312, 1315-16 (9th Cir. 1998)(same). The First, Second, and Eighth Circuits find that a corrections officer's signature is less than reliable assurance that the incarcerated property owner has received actual notice. See Weng v. United States, 137 F.3d 709, 714-715 (2d Cir. 1998)([w]e do not agree that a federal agency's mailing

of a notice of forfeiture to a federal correctional institution where the property owner is detained constitutes adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner..." "[T]he mere mailing of notice -- even with a required return receipt signed not by the addressee but by the institution -- does not satisfy the requirement of Mullane[1/] that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt'"); United States v. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995) (If the government is incarcerating or prosecuting the property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or is counsel receive "actual notice" of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by judicial condemnation); United States v. Five Thousand Dollars In U.S. Currency, 184 F.3d 958 (8th Cir. 1999); United States v. Woodall, 12 F.3d 791 (8th Cir. 1993) (same).

The Third and Fourth Circuits require evidence of proper delivery procedures within the prison. See United States v. Minor, 228 F.3d 352 (4th Cir. 2000); United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000)(en banc).

In this case, the government did not provide Petitioner with constitutionally adequate notice regarding his $21,940 in U.S.

[1] Mullane v. Central Hanover Bank & TrustCo, 339 U.S. 306 (1950).

currency. Therefore, Petitioner did not receive the forfeiture notification and was unable to object to the forfeiture of his funds. First of all, the government sent notice to the wrong Post Office Box number. (Appendix 1 at 3 in opening brief). The address at the prison where Petitioner was at -- FCI Milan -is P.O. Box 1000. The government sent notice to P.O. Box 100. (Appendix 3 at 6-8 in opening brief). Moreover, James Lawson -- the prison mail clerk -- admitted it was possible the signature on the certified mail receipt could be scmeone else's. (Appendix 3 at 6-8 in opening brief). Additionally, the certified mail receipt has an illegible signature. (Appendix 1 at 3 in opening brief). Furthermore, even if it was Mr. Lawson's signature on the certified mail receipt, Mr. Lawson stated he could not prove the mail was ultimately forwarded to Petitioner because the institution destroyed all of their log books. (Appendix 3 at 6-8 in opening brief). Finally, although the government published notice in the Cleveland Plain Dealer in Cleveland, Ohio, Petitioner was incarcerated in Milan, Michigan and certainly was not going to see a publication in an Ohio newpaper. (Appendix 1 at 3 in opening brief). The government knew Petitioner was incarcerated in Michigan because the government prosecuted Petitioner and put him there. Thus, the Sixth Circuit's opinion is in error. The forfeiture is void and Petitioner's funds should be returned to him because the statute of limitations has expired for the government to initiate legal forfeiture proceedings. See Glasgow v. United States Drug Enforcement Admin., 12 F.3d 795,

799 (8th Cir. 1993)(administrative forfeiture void due to defective notice; case remanded to vacate forfeiture and to order DEA either to return the property or initiate judicial forfeiture proceedings); Clymore v. United States, 164 F.3d 569, 572-574 (10th Cir. 1999) (If the five-year statute of limitations has expired, the government is precluded from initiating judicial forfeiture proceedings).

The above proceedings are exactly what the Fifth Amendment to the United States Constitution forbids, the taking of Petitioner's property without due process of law.

The government claims in a footnote on page 8 of its brief, that the evidence showed that the incorrect address was sufficient in that the notice was in fact received at the Milan FCI where it was signed for by the appropriate prison official. The government is wrong.

In addition to an incorrect address, the certified mail receipt has an illegible signature. (Appendix 3 at 6-8 in opening brief). This is probably the signature of the individual who owned P.O. Box 100, not the signature of prison staff at P.O. Box 1000. Moreover, prison employees will support government attorneys because they work for the same government. Allowing anything less than "actual notice" would be granting the government a windfall. Prison officials can throw away the forfeiture notification -- at the FBI or DEA's request -- and then support the U.S. Attorney's Office by claiming the mail was delivered. The government would be able to take any prisoner's property without due process.

Additionally, the government argues that Petitioner should not have waited as long as he did to move for return of his property because the prison log books would have provided information regarding the delivery of the certified mail notice. (Government's brief at 10). This is wrong.

First of all, because Petitioner did not receive notification, he was unaware that the government forfeited his property. Second, the prison log books are destroyed after one (1) year. (Appendix 3 at 8 in opening brief).

Finally, the government claims that because of new statutory provisions, this issue will only effect a small and rapidly diminishing number of cases, therefore, further review is unwarranted. (Government's brief at 11). The government is wrong.

There are literally thousands of cases under the old system still going through the forfeiture process. Thus, this argument must fail.

Because of the split in the circuits, and because the government has taken Petitioner's property in violation of his Fifth Amendment due process rights, this court should grant certiorari, reverse the lower court, and order Petitioner's funds returned to him.

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

The government confiscated Petitioner's 1984 Monte Carlo without providing Petitioner with due process of law. This was established

in prior proceedings. (Appendix 1 at 4 in opening brief). Thus, the forfeiture is void. See United States v. Giraldo, 45 F.3d 509, 512 (1st Cir. 1995)("If the notice turns out to have been inadequate, the forfeiture is void"); United States v. Rodgers, 108 F.3d 1247, 1255 (10th Cir. 1997); Clymore v. United States, 164 F.3d 569, 572 (10th Cir. 1999). Therefore, the district court could only order the automobile returned or direct the government to initiate judicial forfeiture proceedings. United States v. Volanty, 79 F.3d 86, 88 (8th Cir. 1996)(noting that "[w]hen an administrative forfeiture is void for lack of notice, a district court must set aside the forfeiture declaration and order DEA either to return [the] property or commence judicial forfeiture in the district court"); Glasgow v. United States Drug Enforcement Admin., 12 F.3d 795, 799 (8th Cir. 1993). Moreover, the five-year statute of limitations expired, therefore, the government is precluded from initiating judicial forfeiture proceedings. See Clymore v. United States, 164 F.3d 569, 572-574 (10th Cir. 1999).

The Sixth Circuit ruled that because Petitioner stated during an evidentiary hearing that the 1984 Monte Carlo may have been purchased with drug proceeds, the district court did not have to order the automobile returned. (Appendix 5 in opening brief). This ruling is in error. The district court did not have jurisdiction to do anything but order Petitioner's vehicle returned to him or direct the government to initiate judicial forfeiture proceedings because there was absolutely no forfeiture proceedings before the

court. Because the five-year statute of limitations expired (see Clymore, supra, the district court's only option was to direct the government to return Petitioner's vehicle. The government lost its opportunity to forfeit the vehicle as drug proceeds when it failed to initiate legal forfeiture proceedings. See United States v. Giovanelli, 998 F.2d 116 (2d Cir. 1993)(The forfeiture statutes impose no duty on a defendant to prevent the government from losing its rights through carelessness).

The above proceedings are exactly what the Fifth Amendment forbids. The taking of Petitioner's property without due process of law. If the government is able to take Petitioner's automobile without any forfeiture proceedings initiated, then the forfeiture statutes are useless. We would not even need any forfeiture statutes.

Additionally, as to Petitioner's personal property, the government did not initiate any forfeiture proceedings. (Appendix 1 at 4 in opening brief). (Also see list of personal property at Appendix 2, pp. 6-10). Therefore, Petitioner should have been compensated for the destruction of his personal property because the district court was without jurisdiction to order it forfeited.

Further, the government argues that Petitioner admitted that he purchased all of his personal property with drug proceeds. (Government brief at 14). This is wrong. Moreover, there is an error in the Sixth Circuit's ruling. Petitioner only claimed to have purchased two items with drug proceeds. The transcript states:

THE COURT: Well, what was bought by drug money and

what wasn't bought by drug money?
Can you go through the listing and indicate that to me? When you say "drug money," you mean the proceeds from the sale of drugs contrary to law?

MR. DUSENBERY: Yes.

THE COURT: All right.

MR. DUSENBERY: The cellular One Telephone.

THE COURT: Well, why don't you just number them by the number.

MR. DUSENBERY: Number 1.

THE COURT: Okay.

MR. DUSENBERY: Number 9, Realistic Pro Scanner. I believe that's all.

(Appendix 2 at 15-16). The government lost its opportunity to forfeit Petitioner's personal property as drug proceeds when it failed to initiate forfeiture proceedings. See United States v. Giovanelli, 998 F.3d 116 (2d Cir. 1993)(The forfeiture statutes impose no duty on a defendant to prevent the government form losing its rights through carelessness). The government cannot justify retroactive destruction of the property. How the property was obtained is irrelevant. If the government wanted to obtain forfeiture of the property as drug proceeds, it had to follow the proper channels established by Congress through the forfeiture statutes. See United States v. One Ford Coach, 307 U.S. 219, 226 (1939)(The forfeiture statutes give the government vast and important powers, but they must be exercised in the precise manner the statutes provide). Here, the government did not exercise the statutes at all.

Because the government has taken Petitioner's automobile and personal property without instituting legal forfeiture proceedings, this court should grant certiorari, reverse the lower court, order Petitioner's automobile returned and compensation for his personal property.

Conclusion

Because of the split in the circuits and the important Federal question regarding Petitioner's automobile and personal property, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

/s/_____
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CERTIFICATE OF SERVICE

It is HEREBY CERTIFIED that a copy of the foregoing this ____ day of _____, 2001, was served upon the following:

Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/_____
Larry Dean Dusenbery